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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

STATE OF MISSOURI ex inf. JOHN M. DALTON, Attorney General, ex rel. RICHARD E. HOLEKAMP, et al., Appellants,

vs.

HOLEKAMP LUMBER CO., a Corporation, et al., Appellees.

No. 870.

On Appeal from the Supreme Court of the State of Missouri.

MOTION TO DISMISS APPEAL
and
BRIEF IN SUPPORT THEREOF.

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On Appeal from the Supreme Court of the State of Missouri.

MOTION TO DISMISS APPEAL.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal to this Court from the final judgment of the Supreme Court of Missouri be dismissed, on the ground that it does not present a substantial federal question.

EUGENE H. BUDER,

LEONARD E. MARTIN,
Attorneys for Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

QUESTION PRESENTED.

Appellees take exception to Appellants' statement of the question presented, both in the notice of Appeal and in the Jurisdictional Statement, for omitting the essential element of the opinion of the Supreme Court of Missouri, which is that the Missouri Legislature had reserved power over corporate charters in 1908 at the time of the incorporation of Holekamp Lumber Company. Appellees further take exception to Appellants' statement of the question presented for postulating that the authority to extend the corporate duration by a simple majority vote of the shareholders came only from the statutes enacted in 1943 now under attack by Appellants. Appellees restate the question presented as follows:

Where in the Constitution of 1875, as construed by the Supreme Court of Missouri, the state reserved the power to its Legislature to repeal, change, or amend, by general laws, the general laws authorizing corporations to be formed and the general laws pertaining to amendment of corporate charters, and where Holekamp Lumber Company was incorporated in 1908 under general law for a period of fifty years, the maximum then permissible, and extended its duration for an additional period of fifty years in 1957 by a vote of 58% of its shareholders pursuant to definite statutory authority enacted in 1943, assuming that such an extension could have been made only by the vote of three-fourths of the shareholders prior to the 1943 enactment, does the statute of 1943, in violation of the Federal Constitution, impair the obligation of any contract of the minority shareholders who opposed the extension?

STATEMENT OF THE CASE.

Appellants' Statement of the Case likewise omits all reference to reserved power and the Missouri Constitution of 1875. At 340 S. W. 2d 680-681 (pp. 21-24 of the Jurisdictional Statement) the Supreme Court of Missouri construes the pertinent parts of that constitution, and concludes: "We, therefore, hold that the 1875 Constitution did contain a sufficient reservation to permit our Legislature to adopt general laws authorizing amendments to articles of incorporation of existing corporations, organized under general laws, to be made by a majority vote of their shareholders."

Appellants' statement, in referring to R. S. Mo. 1899, under which Holekamp Lumber Company was organized, sets out part of Section 972 thereof, providing for accepting the general corporation laws by a three-fourths vote and taking an extension of duration incidental thereto, but makes no mention of Section 958, R. S. Mo. 1899, which authorized charter amendments in general terms, only restricting them to powers that could originally have been invoked by the corporation. The Jurisdictional Statement, however, does cite Section 958 as a statute involved, and sets it out at pp. 65-66. Section 958 is treated by the opinion of the Supreme Court of Missouri at 340 S. W. 2d 682-683 (Jurisdictional Statement, pp. 26-27).

ARGUMENT.

I. Even if the Statute of 1943 for the First Time Permitted Extension of a Corporate Term by a Simple Majority Vote, It Is Free From Constitutional Doubt Because of Missouri's Reserved Power.

The Supreme Court of Missouri held that the State, under its Constitution of 1875 (in effect until 1945), had reserved the power to its Legislature to repeal, change, or amend, by general laws, the general laws authorizing corporations to be formed, and the general laws pertaining to charter amendments (340 S. W. 2d at 680-681, 683; Jurisdictional Statement, pp. 21-24, 28). This finding of reserved power with respect to the charters of corporations such as Holekamp is the very heart of the opinion. This finding is clearly right. The Court construes the words of the Constitution to find the necessary intent of the constitutional convention. That such was indeed the intent of the framers is shown by the record of their debates. Journal of the Missouri Constitutional Convention, 1875 (State Historical Society of Missouri), Vol. 1, pp. 178-179, Vol. 2, pp. 527-528, 831; Debates, Constitutional Convention of 1875 (State Historical Society of Missouri), Vol. VIII, pp. 364-399, 490-493.

Appellants do not now question the correctness of the Missouri Supreme Court's finding of reserved power. They recognize such finding and claim only: "Both the St. Louis Court of Appeals and the Supreme Court held that the only way Appellees' action could be sanctioned is by a holding that no Constitutional right was involved" (Jurisdictional Statement, pp. 14-15). But no constitutional right is involved; exactly such a holding was made by this Court in **Phillips Petroleum Co. v. Jenkins**, 297 U. S. 629, 634; 56 S. Ct. 611, 613; 80 L. Ed. 943, 947-948 (1936); where reserved power becomes part of the contract

between the state and the corporation, as in the case at bar, the clause of the Federal Constitution on obligation of contacts does not apply. There is really nothing more to argue about; Appellants are relying solely on Article I, Section 10 of the Federal Constitution (Impairment of the Obligation of Contracts) (Jurisdictional Statement, pp. 6-7, 8-9; the Notice of Appeal refers only to this clause). Although the principle is well established by the **Phillips** case, we discuss very briefly the history of reserved power as treated in other cases decided by this Court.

In response to Justice Story's concurring opinion in **Trustees of Dartmouth College v. Woodward**, 4 Wheat. 518, 712, 4 L. Ed. 629, 677 (1819), virtually all the states of the Union put reserved power over corporations into their constitutions or statutes (Fletcher, Cyclopedia of Corporations, Vol. 7, Section 3668, Note 9). By the decision now appealed from, Missouri was simply shown to be in the same position as virtually all the other states. Since the Missouri Legislature had this reserved power, the enactment of the Corporation Code of 1943 (including the sections thereof now under attack) was an exercise of that power to the extent necessary to the validity of the new code. Under an unbroken line of decisions of this Court, this crucial element of reserved power precludes all constitutional doubt concerning the statutes presently under attack.

In the leading case of **Looker v. Maynard ex rel. Dusenbury**, 179 U. S. 46, 52; 21 S. Ct. 21, 23; 45 L. Ed. 79, 81 (1900), this Court held:

> "The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a

charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."

This doctrine was approved in **Phillips Petroleum Co. v. Jenkins**, 297 U. S. 629, 56 S. Ct. 611, 80 L. Ed. 943 (1936), which appears to be the last word on the subject by this Court. In the **Looker** case, supra, this Court upheld a Michigan statute imposing compulsory cumulative voting on a corporation, against the objection of the majority shareholders that this law impinged on a vested right of theirs to elect the entire board of directors. The Court thus expressly held that reserved power extends to contractual relations **among the shareholders**, explaining its position by reference to prior cases and the dissents therein. Now the duration of a corporate charter, presently before this Court, is a matter which prima facie concerns the state only (opinion of Sup. Ct. of Mo., 340 S. W. 2d at 682, Jurisdictional Statement at pp. 25-26, citing with approval **Smith v. Eastwood Wire Mfg. Co.**, 58 N. J. Eq. 331, 43 A. 567, 568). Insofar, however, as the minority shareholders may have an interest in the limitation of the corporate period, that interest is clearly defeasible under the **Looker** doctrine.

Other Supreme Court cases holding contractual rights of shareholders to be within the reserved power, and hence subject to changes imposed or authorized by subsequent law, are the following: **Sherman v. Smith**, 1 Black. 587, 17 L. Ed. 163 (1862) (imposing individual liability on shareholders of a bank); **Miller v. New York**, 15 Wall. 478, 21 L. Ed. 98 (1873) (reduction in voting power of incorporators from power to elect nine directors out of thirteen, to power to elect only six out of thirteen); **Close v. Glen-**

wood Cemetery, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408 (1883) (removing control of an incorporated cemetery from original proprietors to a board of trustees, and limiting the future returns to the original proprietors, to one-fourth of the receipts); **Polk v. Mutual Reserve Fund Life Association**, 207 U. S. 310, 28 S. Ct. 65, 52 L. Ed. 222 (1907) (changing insurance of members from assessment plan to flat premium "old line" insurance). It is submitted that all these changes are more drastic than extending the corporate term. In **Coombes v. Getz**, 285 U. S. 434, 441-442, 52 S. Ct. 435, 436, 76 L. Ed. 866, 871 (1932), this Court refused to let the reserved power extend so far as to permit cutting off the vested quasi-contractual right of a corporate **creditor** against directors of the corporation, but expressly recognized once again that reserved power does extend to changing the interrelations of state, corporation, and stockholders.

This Court has apparently never passed specifically on the constitutionality of extending a corporate charter under subsequent law enacted pursuant to reserved power, but the question is clearly answered in principle by the cases just discussed, and in the affirmative. Such extension, moreover, has been specifically approved, against charges of impairment of obligation of contract, by all the state courts whose opinions are cited by the Supreme Court of Missouri, 340 S. W. 2d at 628, Jurisdictional Statement at pp. 25 and 26, and by the St. Louis Court of Appeals, 331 S. W. 2d at 177-179, Jurisdictional Statement at pp. 39-43. (The Court of Appeals distinguished these cases on the theory that Missouri had no reserved power.) Appellants have never cited, and do not now cite, a single case holding that such an extension violates the clause against impairing the obligation of contracts or any other provision of the Constitution.

Concerning the construction placed upon the state Constitution of 1875 by the Supreme Court of Missouri, to the

effect that the constitution did contain reserved power over corporate charters, Appellants do not even suggest that that construction should be reviewed by this Court. To some extent at least, they say they have never questioned it (Jurisdictional Statement, p. 14). The general rule is that the construction of state constitutional provisions or statutes by the highest court of the state is binding on this Court. **Missouri ex rel. Hurwitz v. North**, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 818 (1926). True, an exception to this rule has been made in cases on obligation of contract (**Coombes v. Getz, supra**), but even there the state construction is to be given great weight, **Dodge v. Board of Education of Chicago**, 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (1937), and will be followed unless manifestly wrong. **Hale v. Iowa State Board of Assessment and Review**, 302 U. S. 95, 58 S. Ct. 102, 82 L. Ed. 72 (1937); **Atlantic Coast Line R. R. Co. v. Phillips**, 332 U. S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947). Here Missouri has interpreted its 1875 Constitution, not so as to give the state extraordinary or novel powers, but only to give it such powers as it certainly did have under its 1865 Constitution (340 S. W. 2d at 680, Jurisdictional Statement at p. 22), certainly could have without violating the Federal Constitution, and such powers as virtually every state has successfully claimed for itself since the decision of the **Dartmouth College** case. The decision now appealed from potentially affects every extant Missouri corporation formed between 1875 and 1943, and sets at rest, once and for all, vague doubts that have heretofore been entertained concerning the powers of those corporations to modernize themselves in keeping with current law. Practically speaking, the decision restores Missouri to its competitive position in holding and attracting corporate business with its home base in Missouri, after a long period of vague uneasiness and a short panic caused by the opinion of the St. Louis Court of Appeals. On broad lines of policy, there is nothing in a federal sys-

tem requiring federal review of a state decision which so eminently well disposes of a state problem.

Even on narrow legal grounds, there is no call for review of the state constitutional interpretation here involved. The broadest authority asserted by this Court is that it will deferentially re-examine the facts said to have given rise to the contract and the law said to have impaired it. **Coombes v. Getz, supra.** Here these questions are not open: there was a contract in the form of the corporate charter under the **Dartmouth College** doctrine, but its obligation was not impaired if the state had reserved power at the time of incorporation. The only open question is the underlying one of whether Missouri had such reserved power, answered in the affirmative by the Supreme Court of Missouri. State construction of such underlying questions of state law will not be reviewed by the Supreme Court. **City of New Orleans v. New Orleans Waterworks Co.**, 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943 (1891); **Long Sault Development Co. v. Call**, 242 U. S. 272, 37 S. Ct. 79, 61 L. Ed. 294 (1916).

To sum up, there is no reason why this Court should review Missouri's finding of reserved power in its former constitution, which is certainly not manifestly wrong, and once reserved power is in the case there is no substantial federal question, because it has been repeatedly held by this Court that reserved power takes a corporate charter out of the class of contracts protected against impairment of obligation by the Federal Constitution, even as to rights of shareholders claimed under the charter.

II. **The Right to Extend the Term of Holekamp Lumber Company by a Simple Majority Vote Existed From the Beginning; Hence There Was No Possible Impairment of Contract.**

Appellees contended in the Missouri courts that a simple majority of the shareholders had the power under the cor-

poration laws of Missouri in effect in 1908 to extend the corporate term for an additional period of fifty years, as was done by Holekamp Lumber Company in 1957. In this additional respect, we take exception to Appellants' statement of the question on appeal, because it postulates that only the corporation Code of 1943 authorized an extension by a simple majority. We submit that the Supreme Court of Missouri held, or almost held, that in 1908 stockholders could extend the corporate term by a simple majority vote. If this Court should review that decision, it would undoubtedly come to the same conclusion, particularly as it deferred to the Missouri Court's construction of the pertinent Missouri statutes. On this view there would be no significant change in the law between 1908 and 1943, and hence no possible impairment of contract.

This question breaks down to determining whether such an extension could be effected under Revised Statutes of Missouri 1899, Section 958, generally authorizing charter amendments, as distinguished from Section 972, which pertained to accepting the new laws, requiring a three-fourths majority therefor, and granting an extension incidental to such acceptance. The St. Louis Court of Appeals considered the question at length, and decided it against Appellees (331 S. W. 2d at 181-184, Jurisdictional Statement at pp. 48-54). We submit that the Supreme Court of Missouri also decided the question, although somewhat unobtrusively, and decided it in favor of Appellees and the existence of the prior power (340 S. W. 2d at 682-683, Jurisdictional Statement, at pp. 26-27). The Court held that only specially chartered corporations (not Holekamp) were intended to accept the general laws under Section 972, and that corporations organized under general laws (like Holekamp) were included in the terms of Section 972 "undoubtedly" for the purpose of collecting a fee from them when they extended. The opinion also suggests that the three-fourths vote was required only be-

cause there was a question of relinquishing the special privileges conferred by a special incorporation. Then the opinion refers to Section 958, generally authorizing amendments, and cites an earlier case holding it in pari materia with Section 972, and requiring the tax to be paid under Section 972 when extension was made by **charter amendment.** Only Section 958, not Section 972, authorized charter amendments. The conclusion is not expressly drawn by the Court, but we will draw it here: Section 972, insofar as it pertained to accepting the new laws, applied only to special-charter corporations, and extension was incidental to such acceptance; insofar as it called for a tax on extension it applied to all corporations; Section 958 applied generally to amendments and was in pari materia with 972; taking the two together, a general-law corporation extending by corporate amendment had to pay the tax called for by Section 972; but since the acceptance provisions (and hence the incidental extension provisions) of 972 were not intended to apply to such a corporation, its power of extension, clearly recognized here and in the earlier case cited, could only have come from Section 958. And the earlier case, as stated in the current opinion, recognized **extension by charter amendment,** which means by Section 958. It was never expressly decided what majority was required under Section 958, as the opinion observes; but in the absence of any special requirement imposed by statute or decision, on general principles or corporation law, a simple majority was enough. (Note again the Court's suggestion that a three-fourths vote was required only for purposes of relinquishing special privileges.) All the foregoing premises are stated in the Court's opinion, and the conclusion necessarily follows. It is submitted that the only reason why the conclusion was not drawn as we have drawn it is that the Court considered that the question would never arise again. If a conclusion were forced, it would inevitably be as above stated.

CONCLUSION.

The appeal should be dismissed because the federal question raised by Appellants is insubstantial. Appellants do not question the Missouri Court's finding of reserved power. With reserved power in the case, the question has been decided against Appellants by a long line of decisions of this Court, that last of which (**Phillips Petroleum,** supra) states that there remains no constitutional question, and hence no federal question. Finally, a review would only confirm an additional ground for supporting the judgment: namely, that the statute under attack merely expressed more clearly what had always been the law and the contractual rights of the parties, and hence could not possibly have impaired those contractual rights.

Respectfully submitted,

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